No. 2680.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

IN ADMIRALTY

UNION FISH COMPANY (a Corporation), Appellant,

vs.

JOHN W. ERICKSON, Appellee.

Appellee's Answering Brief.

F. R. WALL,
Proctor for Appellee.

Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

THE JAMES H. BARRY CO

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APPELLEE'S ANSWERING BRIEF.

I.

THE COURT HAD JURISDICTION.

The libel was for the breach of a maritime contract; not for breaching a contract in part maritime; and this is most clearly shown by what this Court said in the case of the *North Alaska Salmon Company* v. *Larsen*. We quote:

> "We find no merit in the contention that the cause of suit is not within the admiralty jurisdic-

tion of the court, in that appellee's contract for services as a seaman, fisherman, beachman, trapman, *'and such other services as might be required,' by the appellant's superintendent, was not a maritime contract.*

"In *Alaska Packers' Ass'n.* v. *Domenico,* 117 Fed., 99, this court affirmed the jurisdiction in admiralty of a contract made by men who acted as seamen on a voyage to and from salmon fishing grounds in Alaska to work as fishermen during the season, *and assist in canning fish on shore,* and in loading them on board for transportation, notwithstanding that the men while engaged in fishing slept on shore, and mended their nets and cared for the fish on shore. See, also, *The Virginia Belle* (D. C.), 204 Fed., 692; *McRae* v. *Bowers Derdging Co.* (C. C.), 86 Fed., 344; *Disbrow* v. *The Walsh Bros.* (D. C.), 36 Fed., 607." *North Alaska Salmon Co.* v. *Larsen,* 220 Fed., pp. 94 and 95.

Appellant's attempt to distinguish the Larsen and the Domenico cases from this one is necessarily futile, because, of course, there can be no difference in principle in assisting the manager on shore, when possible so to do without interfering with libelant's duties as master, and in performing "such other services as might be required by the appellant's superintendent" or in assisting "in canning fish on shore."

In the Domenico case, the trial Court said (112 Fed., 556): The contract "included work in the can-"nery on shore, in preserving the fish caught by "them"; and this Court (117 Fed., 100 and 101): "The libelants arrived there early in April of the year

mentioned, and began to unload the vessel *and fit up the cannery."* So that case shows that the men did work on shore that was not directly connected with the catching of fish.

Appellant does not yet comprehend what point was decided in the Larsen case. That case did not sound in tort, but in contract. As we said in our brief in the trial Court:

> "In the Larsen case, Larsen testified (Apostles therein, page 23): 'I fished up to the 10th of June (then) I was called ashore *to work ashore;* we started in to discharge fish. When I was discharging fish I worked in a lighter.' The fact that Larsen was working in a lighter, at the very time he was hurt, seems to have caused some confusion in respondent's mind. The Larsen case did not sound in tort; so jurisdiction was not taken because of the locality of the accident. It was a libel for breaches of the contract of good treatment; and all of the breaches occurred *while the libelant was on shore;* so the appellate court sustained the jurisdiction not because of any locality of the injury, but because *a maritime contract* was breached."

> "Upon such a contract, and all its incidents, the rights and remedies of the parties are reciprocal. The contract being maritime, the admiralty, says Curtis, J., in *Church* v. *Shelton,* 2 Curt., 271, 274, 'will proceed to inquire into all its breaches, and all the damages suffered thereby, however peculiar they may be, and whatever issues they involve.' See also, *Cox* v. *Murray,* Abb. Adm., 342; *The J. F. Warner,* 22 Fed. Rep., 342; *The W. A. Morrell,* 27 Fed. Rep., 570; *The Baracoa,* 44 Fed. Rep., 102." *The Electron,* 48 Fed. Rep., 690.

"Where a provision of a charter party for a foreign vessel, though not in itself maritime in character, is so connected with the other stipulations therein as to render it an essential part of the contract, and it appears probable that without it the contract would not have been entered into by the owners, a court of admiralty has jurisdiction of an action for an alleged breach of such provision." *Keyser* v. *Blue Star S. S. Co.,* 91 Fed., 267, syllabus.

"If it (a court) have power over the principal matter, it has it also over the incidents. If it have power to begin, it has power to finish, although in its course it may be called upon to consider and decide matters, which, as original causes of action, would not be within its cognizance." *Ben. Adm.,* 4th Ed., Sec. 16.

"If a contract is maritime in itself it carries all its incidentals with it, and the latter, though non-maritime in themselves will be heard and decided." *Ben. Adm.,* 4th Ed., Sec. 143.

The whole contract here was in its essence (that which constitutes the particular nature of this contract) both for maritime services and for compensation therefor. In fact, *all* of the services rendered here were maritime in their nature, in that they were in furtherance of the main enterprise in which appellant was engaged and of which the Martha was a part. This enterprise was the furthering of appellant's business of catching fish and shipping them to market, and in which enterprise there were working at respondent's salting station at Pirate Cove during the time the libelant was a part thereof, *"including*

Hoelke and the libelant," "about thirty men" (p. 49). In answer to a cross interrogatory to state in detail in what capacity the men there employed were employed, Hoelke said (p. 49): They were principally engaged in fishing. At other times they would be employed in unloading and loading the Golden State. And to the next cross interrogatory, as to how many of the men employed there were engaged in fishing, he said "about 30 men" (p. 49).

So that *all* who were working there, *including Hoelke and the libelant,* were principally engaged in fishing or in loading or in unloading the Golden State. In furtherance of that enterprise, the libelant was master of the Martha; and when not actually commanding her, he did "odd jobs, such as shingling " roofs, packing codfish tongues, bundling empty salt " sacks, counting fish and keeping the Martha in con- " dition for sea and ship shape" (p. 26); all of which were incidental and subsidiary to his contract and in furtherance of the main object of the enterprise of which the Martha was an essential part.

II.

THE CONTRACT WAS FOR A YEAR.

In answering appellant's contentions under this subdivision it is necessary first to get a clear idea of what the issues are and the findings of the trial Court thereon. It then becomes apparent that the testimony shows, without any contradiction, that there was a

hiring for a year, and that appellee was discharged without cause.

It will be observed by the Court in this connection that both the original answer and the amended answer were sworn to by the appellant's president, Mr. Pew (not by Mr. Overton), and that the libel called for an answer to every allegation under oath; that both the original answer and the amended answer say that the contents thereof are true of Mr. Pew's own knowledge, except as to the matters alleged on information or belief. Among the matters that Mr. Pew swore were true of his own knowledge, and not on information or belief, are:

That appellee becoming dissatisfied with his employment, it was mutually agreed between appellant and appellee that appellee's services should end (From Original Answer, pp. 13 and 14);

That thereupon appellee was discharged, to which discharge he assented (Amended Answer, p. 19).

That no period of service was ever agreed to; that libelant was hired for a time not specified (p. 16); that no term of service was mentioned or agreed upon (p. 18).

Nowhere is it pleaded that the discharge was any other than a discharge by mutual consent.

The trial Court found that appellee was hired for a year, and that he was discharged without cause (p. 114).

The testimony of appellee was taken in open court,

and it was peculiarly within the province of the trial Judge to determine the effect of the language used by the witness, and that determination would not be changed by this Court, even if the matter here were doubtful, which it is not.

We submit that the utterly obvious meaning of the testimony upon this point is that the appellee was to go up there for at least a year; and, after the year, to stay longer, if everything was all right.

We say that is the natural construction, which is strongly reinforced by the inherent improbability of any man's quitting a good job on San Francisco Bay and consenting to go to Pirate Cove, Alaska, to be "fired" at any time the inclination of the agent in that out-of-the-way place might dictate.

In addition to the findings of the Judge, we call this Court's attention particularly to the fact that Mr. Pew, appellant's president, who swore that it was true, of his own knowledge, that there was no time specified in the contract, was in court (pp. 89 and 90), and that he failed entirely to enlighten the Court upon this or any other point.

The remainder of appellant's brief under this subdivision has nothing to do with any of the issues made in this case. The libel says the appellee was discharged without cause; the answers say he was discharged by mutual consent.

The admiralty is the most liberal forum in the world, but it is not a ship's fo'c'sle for growling about

everything under the sun, without making an issue thereon:

> The respondent "must put before the court the grounds of his defense, in an answer containing suitable allegations, that the court, as well as the opposite party, may be informed of the grounds of defense . . . whatever may be the prayer of the libel; any party defending the suit must spread before the court the grounds of his defense, or he will be debarred from making his defense, it being a primary rule in admiralty, that the cause must be heard and decided according to the allegations as well as the proofs in the cause." *Ben. Adm.,* 4th Ed., Sec. 391.

The effect of defenses thus solemnly made cannot be changed by any subsequent turning or changing or seeking to direct the Court's attention to something irrelevant and immaterial (*The Markee,* 3 Fed., 45, aff'd. 14 Fed., 112; *Hutson* v. *Jordan,* Fed. Cas. No. 6,959 at page 1,092).

All of the testimony referred to on pp. 11 and 12 of appellant's brief was received by the trial Court subject to libelant's objections (as testimony in admiralty always should be received). Those objections are to be found on pages 99 and 100 of the Apostles, and we are satisfied this Court will find them well taken; for aside from the alleged defenses as to the hiring and the jurisdiction, the only other alleged defense is that of discharge by mutual consent.

There is not a word of testimony to support this alleged consent discharge. The libelant denied that

he ever asked for or consented to his discharge, and Hoelke himself disproves the allegation most emphatically when he says: "I discharged him for the reason that he refused to obey me regarding the working hours" (p. 46). Yet neither Hoelke nor anyone else gives a single instance of libelant's disobedience regarding working hours; and Ericksen's testimony shows that he was always ready, willing and able to work between 6 a. m. and 5 p. m., and that he often worked longer hours; that he always did everything that he was told to do, and that Hoelke never at any time gave him any instructions or orders as to when he was to turn to. And when Hoelke was asked definitely, "Did you ever give the libelant any definite order or orders when he was to start to work?" (p. 39), he answered evasively (p. 50) that when Ericksen "arrived at Pirate Cove I told him " to take a couple of days to get settled down and " then to report for work. I showed him what to do " in odd jobs around the station." And yet again, when asked (p. 39), "Did the libelant ever refuse to do any work that he was definitely ordered by you to do?" he says nothing about any definite neglect or refusal to conform to working hours; but gives an instance (p. 50), which Ericksen denies, and which had nothing to do with the reason given by Hoelke for the discharge, and the instance itself is in direct contradiction of what Hoelke had just said, "The

only order he did not obey was in the matter of getting to work on time" (p. 46).

The Court, on ample testimony, found that the discharge was without cause; so that the testimony referred to in appellant's brief has nothing to do with the issues made by the pleadings under oath.

These irrelevancies are in keeping with the statement in appellant's brief (p. 2), regarding the death of Mr. Overton. There is nothing properly in the record that justified any such statement; there is no showing that Mr. Overton's testimony could not have been taken after the filing of the libel; there is nothing to show that if Mr. Overton had testified he would have contradicted libelant's testimony, and in the face of the sworn pleadings and of all of the circumstances of the case, the suggestion that he would have done so is one of those gratuitous contributions to the record that only darkens counsel with words without wisdom; and, like all matter improperly injected into a cause, should militate against the litigant bringing it in, as we have no legal way of traversing the same.

Under this subdivision, appellant makes a few remarks to the effect that Exhibit "A" (p. 119) was a settlement in full. Such a contention certainly can not be offered seriously in the admiralty, where a receipt is a receipt for the amount received and it is nothing more, unless it is specifically understood

and agreed that it covers other matters. And appellant, while saying here (Brief, p. 12), that libelant was satisfied, says, in the same breath, he asked for more (Brief, p. 12). And counsel for appellant, in his brief below, said:

> "In this case libelant brought a statement of his account from Alaska the statement is in evidence, after collecting that money, he offered to settle this claim for $50.00, of course we concede that that is not binding on him if his claim is good, but it is to be taken into consideration in the whole case."

Now, of course, the Court cannot take into consideration any offer of compromise made prior to suit. The law fixes the measure of the libelant's damages; and after waiting as long as he has, he is entitled to what the law allows him. In the language of the Supreme Court, in the case of *Roehm* v. *Horst,* 178 U. S., 15, referring to its decision in *Pierce* v. *Tenn. etc. R. R. Co.,* 173 U. S., 1, he is entitled "to treat " the contract as absolutely and finally broken, and in " an action recover the full value of the contract to " him at the time of the breach, including all that he " would have received in the future as well as in the " past, deducting any sums that he might have earned " or that he might thereafter earn."

III.

AUTHORITY TO HIRE FOR YEAR.

We repeat here that "any party defending the suit "must spread before the Court the grounds of his "defense, or he will be debarred from making his "defense, it being a primary rule in admiralty, that "the cause must be heard and decided according to "the allegations"; and we say appellant has nowhere pleaded lack of authority on the part of Mr. Overton to hire libelant for a year. So this Court will not go into an alleged issue not made by the pleadings, unless the pleadings are amended and notice given within the time prescribed by rule 7 of the rules in admiralty of this Court, which time has long since elapsed (*The Minnie,* 225 Fed., 36; *Paauhau, etc. Co.* v. *Palapala,* 127 Fed., 921, and *The Flottbek,* 118 Fed., 958, and the cases cited by this Court in the two last-named cases). Therefore, this objection could not be considered, if there were any merit in it.

The objection is, however, without merit, as appears below:

The decisions drawn by appellant from the common law are without application, either to the principle or to the particular facts of this case.

Whether or not Mr. Overton had authority to hire for a year depends necessarily upon all of the circumstances connected with this particular case. There can, of course, be no doubt of the general principle that

a corporation knows those things that it ought, by proper diligence, to have known, as to the general course of its business, and that it may be presumed to have known these things in any contest between the corporation and those who, justified by the circumstances, have dealt with its agents or servants upon the basis of that course of business. The particular facts of this case are:

The appellee had been working for the appellant, as a master of one of its launches about the Bay of San Francisco for several months prior to May, 1914; that he then spoke to Mr. Cox, a clerk for the appellant, about getting a job from appellant in Alaska as station boss; that Mr. Cox said he would speak to Mr. Overton; that a day or two after that libelant went to appellant's main office in San Francisco, as he was in the habit of doing, and there saw Mr. Overton, the only person with whom he talked in contracting for the job that he afterwards secured; that appellant was engaged in the fishing business in Alaska and apparently Mr. Overton was its general manager; that Mr. Overton also hired him to go up on one of the appellant's boats, the Golden State, as the second mate thereof; that the contract here sued on was partially executed at the time that the libelant was discharged.

With these facts in mind, there can be no doubt of the binding effect of the contract made.

In the case of *Baton Rouge & B. S. Packet Co.*

et al. v. *George,* 128 Fed., 914, one George George was hired as a pilot by the corporation, for a year, the master of the vessel doing the hiring orally. There was part performance, and in all other respects the case is on all fours with the one at bar. The conclusion of the trial Court, that the contract was binding, was upheld by the C. C. A., 5th Cir., and libelant recovered his damages for its breach.

The case of the *Wanderer,* 20 Fed., 655, was that of a purser for his wages for the entire year, who was discharged without cause before the end of the term. We quote therefrom:

> "The libelant had made a contract of service for one year. He performed part of the contract, and was ready and willing to perform the residue, but was prevented by the master of the vessel, who discharged him without cause. He sues to recover the balance due on his salary for the year. If he performed his duty while in the service of the vessel, and was ready and willing to perform it for the residue of his engagement, and was discharged without due cause, and was unjustifiably prevented from completing his contract, his rights are the same as if he had completed it. He is entitled to his wages for the whole year, and was entitled to sue for them on his discharge. He has been paid a part of his wages, and sues for the balance.
>
> "In the case of a contract for an ordinary seaman's wages, the lien should not, perhaps, be extended beyond a single voyage, as that is the usual time for which his engagement is made. But the case of a purser stands somewhat on a different footing. His connection with the vessel is gener-

ally more permanent than that of a common seaman. He represents to some extent the owners, and his qualifications are of such a character that a competent purser cannot usually be employed for a single trip. We, therefore, do not think an engagement of a purser for a year an unreasonable one, and such an engagement, we think, would be binding on the boat."

And in the case of the *Ira Chaffee,* 2 Fed., 401, the Court says:

"It must now be considered as settled that if the ship enters upon the performance of its work, or any step has been taken toward such performance, the ship becomes pledged to the complete execution of the contract."

In the case of the *Mary Elizabeth,* 24 Fed., 398, the Court says:

"Under these circumstances I think it is clear that if there is any doubt as to whether the contracts made by the master with the libelants were within the scope of his agency and authority, and binding on the owners, there can be no doubt that the owner ratified the contract by silence and apparent acquiescence. The agency to contract with the libelants actually existed under the law of the case and the direction of the owner. It was therefore the owner's duty, being present, to have informed himself of the terms and conditions of the contract. Where an agency actually exists, the mere acquiescence of the principal may well give rise to the presumption of an intentional ratification of the act. *Story, Ag.* (4th Ed.), 256. *It would not be equity to allow the principal to stand by and make no inquiries, and then avail himself of*

the contract made in his behalf, and, after part performance, repudiate the contract as one made without authority.

"In the case of Jackson there is evidence to show that the owner and present claimant was fully informed before the rendition of any services of the terms of the contract, and further that he expressly ratified it at a later day; but as the evidence on these points is conflicting, I base my decision on the ground that the owner was silent when he should have spoken."

"The propeller, having entered upon the agreement to tow the libelant's barge during the entire season of 1894, is answerable in rem for the breach of the agreement by abandonment of the barge in September." *The Oscoda,* 66 Fed., 348.

The case of *Kells* v. *Boyd,* 31 Fed., 621, was that of a master suing for his wages. It is evident from the report that all of the agreements were oral. The cause was decided by the Court on its merits, without regard to the fact that there was no written agreement. *Brown* v. *Hicks,* 24 Fed., 811, was a case identical in principle with the one at bar, except that the agreement was written. Recovery was allowed. *Brennan* v. *Peter Hogan & Co.,* 147 Fed., 290, was, apparently, on an oral contract, and recovery was allowed. *Parsons* v. *Terry,* Fed. Cas. 10,782, was for breach of contract, and recovery was allowed for the season on which the ship was about to enter when the master was discharged. *Lombard S. S. Co.* v. *Anderson,* 134 Fed., 568, is also in point. It was a libel for wages by the master of a "tramp" steamer, who sued

for his wages from the time he was discharged in Manila, until he returned to New York, the port of his shipment, which wages, the Court allowed. There was there, evidently, no written agreement, for the Court says:

> "The appellee did not prove that he had been employed as master for any particular voyage, *nor for any special period of time* . . . The owners of the steamship had the right to remove the master at any time, and without assigning any cause, and without being liable for damages, *unless they had, by the terms of their contract with him, yielded that right,* which it seems that they did not do."

IV.

THE STATUTE OF FRAUDS HAS NO APPLICATION.

The contract was a maritime contract, entire in its nature; and appellant's contentions here are opposed by the specific language of the Supreme Court and of this Court.

> "The opinion of the Supreme Court (in the case of the *Resolute,* and the *Wm. Hoag,* 168 U. S., 437, and 168 U. S., 443) therefore, settle that the contract of the master is maritime." *Hughes on Adm.,* p. 27.

The manner in which the Supreme Court of the United States has disposed of the particular question here is stated in the language following, taken from

the cases of *Workman* v. *Mayor, etc. of New York,* 179 U. S., p. 560 *et seq.:*

> "The decisions of this Court overthrow the assumption that the *local law* or decisions of a State can deprive of all rights to relief, in a case *where redress is afforded by the maritime law,* and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States. . . . In *Liverpool & G. W. Steam Co.* v. *Phoenix Ins. Co.,* 129 U. S., 443, a *maritime* contract *executed in New York* was held to be an *American* contract, and the *local law* of New York was declared *not* to govern in its construction. . . . In the *Max Morris case,* 137 U. S., 14, the question for decision was, whether, in a court of admiralty, in a case where recovery was sought for personal injuries to the libelant arising from his negligence, concurring with that of the vessel 'any damages can be awarded or whether the libel must be dismissed, according to the rule *in common law cases.*' It was held that 'the mere fact of the negligence of the libelant as partly occasioning the injuries to him, when they also occurred through the negligence of the officers of the vessel, does not debar him entirely from a recovery.' "

This case establishes as controlling authority, in a case like the one at bar depending in a court of admiralty, where the subject-matter is essentially maritime in its nature, that the place of execution of the contract does not determine upon what equitable principles this Court will administer justice. All contracts for service between a seafarer and his employer, made in the different States of the United States, are Ameri-

can contracts, essentially. They may be performed in any part of the world, and an admiralty court enforces them according to the maritime law. This very principle was considered and decided adversely to appellant's contentions by this Court in the case of *Pac. Coast S. S. Co.* v. *Bancroft-Whitney Co.* We quote from the opinion in that case in 94 Fed., at page 188:

> "The questions raised by appellant as to the applicability and effect of the sections of the Code of Civil Procedure and statute of limitations . . . will be considered together.
>
> "The fact that the bill of lading was signed within the State of California, before the goods were shipped on board the Queen, and that the freight was to be delivered at a port within the State, does not bring the contract within the provisions of the statutes of California. . . . These libels were brought under, and by virtue of, the maritime laws of the United States. In the exercise of their admiralty and maritime jurisdiction, the United States Courts are governed solely by the legislation of Congress and the general principles of maritime law, *and are not bound by State statutes.*" Citing cases.

The case of *Olson* v. *Oregon Coal and Nav. Co.*, 104 Fed., 576, was a libel for tort, where the contract for services between the master and servant was made in California. In that case this Court said (p. 576): "It is true that the present case is to be determined, not by the common law, but by the rules of the maritime law."

If the bill of lading in the Queen, *supra,* ~~and~~ or the claim for damages for personal injuries in the Max Morris, *supra,* had been sued on in the State court, as each might have been, the defendant would have had a complete defense under the State law: in the admiralty, in cases arising under the maritime law, these defenses, given by the State law, are not considered; but, as the Supreme Court says in the Workman case, *supra* (p. 563), it is *"the duty of the admiralty court to grant relief* in accordance with the principles of the maritime law" (Court's italics).

We submit that the Court will here enforce this maritime contract according to the rules of the maritime law; and the maritime law permits the master of a vessel to recover for a breach of an oral contract for services, without reference to State statutes, if the claim be not too stale to be enforced by the admiralty.

It is respectfully submitted the decree should in all things be affirmed.

F. R. WALL,
Proctor for Appellee.